SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-958

NEWAL W. GRIFFIN,

Respondent,

versus

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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NEWAL W. GRIFFIN,
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UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Respondent, Newal W. Griffin, presents to the Court this brief in opposition to the petition for a writ of certiorari to the Supreme Court of the State of Louisiana filed by petitioner, Universal Underwriters Insurance Company.

STATEMENT OF FACTS

Respondent, Newal W. Griffin, essentially agrees with the presentation of statement of facts made by petitioner herein, with the following exceptions.

Petitioner has failed to mention in its statement of facts the express finding by the Louisiana Supreme Court that, "There is no proof that plaintiff actually received this notice [a piece of correspondence allegedly sent to plaintiff's Texas residence by the Texas Industrial Accident Board] or that he [respondent] ever directed any claim for compensation to the Texas Board." *Griffin v. Universal Underwriters Insurance Company*, 283 So.2d 748, 749 (La. Sup. Ct. 1973).

Similarly, respondent takes issue with the statement contained on page 7 of petitioner's petition to the effect that the Texas Industrial Accident Board ruling could not be "collaterally attacked by filing *another suit* for workmen's compensation benefits in the State of Louisiana" (emphasis added). The inference drawn therefrom is in conflict with the express findings of fact by the Louisiana courts negating the filing by respondent of any type of claim whatsoever in Texas or in anywise participating actually or constructively in such proceedings. Per contra, the first and only suit ever filed was that filed by respondent in Louisiana on July 27, 1971, or some three weeks before the Texas Industrial Accident Board took its unilateral action on August 18, 1971, without any prior notice to respondent.

REASONS FOR DENYING THE WRIT

Petitioner argues that the disposition of this litigation by the Louisiana Supreme Court conflicts with this Court's holding in *Magnolia Petroleum Company v. Hunt*, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1943).

It is respectfully submitted that petitioner is in this regard in error, and that the instant litigation is readily factually distinguishable from the fact situation which obtained in the *Hunt* case.

In this connection, respondent respectfully incorporates as Appendix I, pertinent excerpts from his original brief filed with the Supreme Court of Louisiana, and particularly directs this Court's attention to the factual distinctions between the instant case and the *Hunt* case demonstrated in conjunction with Argument On Assignment Of Error Number 5 (Appendix I, p. 19a). A review of both the intermediate Louisiana appellate court's opinion in *Hunt v. Magnolia Petroleum Company* as well as this Court's opinion in *Magnolia Petroleum Company v. Hunt* readily discloses that plaintiff Hunt actively initiated a claim for compensation pursuant to the law of the State of Texas, and only after having made such an election of remedy did plaintiff Hunt then seek to revoke his election of remedies and attempt to pursue a subsequent claim for workmen's compensation benefits in Louisiana. This Court clearly mentions in its opinion in *Magnolia Petroleum Company v. Hunt* that plaintiff Hunt was free to pursue his remedy either in Texas or in Louisiana, but having first chosen to pursue such compensation claim in Texas, he was bound by such choice of forums and concomitant election of remedies, and could not thereafter with impunity disregard the Texas proceedings and file another claim in Louisiana.

Such is clearly not the case with regard to respondent Griffin herein, but on the contrary, respondent

Griffin initiated one and only one claim for compensation benefits, and that was his instituted suit in the Louisiana trial court for Ascension Parish.

Such a factual distinction was recognized by the Louisiana Court of Appeal for the Third Circuit in *Ryder v. Insurance Company of North America*, 282 So.2d 771 (La. App. 3d Cir. 1973), which decision was handed down on September 18, 1973, and thus before disclosure of the Louisiana Supreme Court's decision in the instant case which was handed down on September 24, 1973 (see 283 So.2d at 748). In *Ryder*, the Louisiana appellate court correctly recognized the fact this Court's decision in *Magnolia Petroleum Company v. Hunt* was factually inapposite, viz.

> "[4] *It is quite evident that it was the EMPLOYER AND INSURER who obtained the decision from the Georgia Workmen's Compensation Board, and it should be pointed out that this was only after plaintiff's counsel was insisting on his rights to benefits under the Louisiana law, as suit had been filed under the Louisiana law. Plaintiff himself did not seek a ruling or adjudication before the Georgia Workmen's Compensation Board.* This alone makes the Louisiana doctrine of res judicata inapplicable. Further, the Magnolia case has been severely restricted, and it has been considerably discredited by the case of Industrial Commission v. McCartin, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140 (1947). In that case, the United States Supreme Court ruled

> that a judgment awarding compensation would not bar the claimant from seeking additional benefits in another State if the laws of the State granting the first award did not expressly prohibit such additional relief. We are cited to no authority by defendant that the State of Georgia had any prohibition against additional relief. *The Magnolia case is further rendered inapplicable, because in Magnolia, the employee pressed a claim for judgment in the first State. That is not the case here, as has already been pointed out.* It was only after plaintiff obtained Louisiana counsel and was insisting on his rights to benefits under Louisiana law, that employer's insurer sought to get a decision of the Georgia Workmen's Compensation Board terminating total disability benefits, and it should be noted here that the Georgia Board found that plaintiff was totally disabled."
> (*Ryder v. Insurance Company of North America*, 282 So.2d at 774 — emphasis added.)

It is for this same reason that petitioner's reliance on *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, ____ L.Ed. ____ (1955) is unfounded, inasmuch as this Court in *Carroll v. Lanza* distinguished *Magnolia Petroleum Company v. Hunt* as follows:

> "Nor do we have a case where an employee, knowing of two remedies which purport to be mutually exclusive, chooses one as against the

other and therefore is precluded a second choice by the law of the forum."
Carroll v. Lanza, 75 S.Ct. at 806.

Again, and for the same reasons, petitioner's reliance on *Gasch v. Britton*, 202 F.2d 356 (D.C. Cir. 1952) is unfounded. *Gasch* is again a case where the plaintiff widow first filed a claim for compensation death benefits in Maryland, and after having been awarded all benefits possible under the Maryland Workmen's Compensation Statute, she then sought to file another compensation claim under the Federal Longshoremen and Harbor Workers Compensation Act, which was by Federal statute made the Compensation Act for the District of Columbia. The court held that she was bound by her prior choice of forums on authority of *Magnolia Petroleum Company v. Hunt*, cited supra:

"... Gasch was killed while engaged on a job in Maryland. *His widow, for herself and two minor children, filed claim for death benefits under Maryland's Compensation Law. All allowable benefits were awarded.* After receiving a few payments Mrs. Gasch petitioned the Maryland Commission to vacate the order. The petition was denied and the order affirmed. No appeal was taken from either order and the award became final. *Mrs. Gasch, for herself and the children, followed with a claim before Appellee Britton, Deputy Commissioner for the District of Columbia, for the larger benefits allowed under the District's Compensation Act, subject to credit for the*

> *amount of the Maryland award ...*" (202 F.2d at 357 — emphasis added)

The Federal Appellate Court clearly recognized the issue in the case was whether an employee or his beneficiaries can claim compensation in another jurisdiction *after* having received an award in Maryland, which issue the court resolved adversely to the claimants:

> "... Here the question is, can an employee, or his beneficiaries, claim compensation in another jurisdiction after receiving an award in Maryland? ..." (202 F.2d at 362.)

Petitioner in essence asserts that even though respondent elected to pursue his compensation remedy in Louisiana and filed suit thereon after amicable demand to no avail *before* either respondent or his attorney received any notice whatsoever from the Texas Industrial Accident Board concerning the so-called final award, and in fact *before* this order was ever rendered, for some reason respondent was required to place his Louisiana suit for compensation benefits in abeyance, or possibly even abandon it, and hire another attorney to appear before the Texas Industrial Accident Board or a court of review in Texas or else suffer the consequences of res judicata. This simply cannot be the law. All of the cases clearly show that respondent-employee has the right to elect the forum, which respondent did in this case. Respondent filed his suit for compensation benefits in Louisiana *before*

the Texas Industrial Accident Board took any action whatsoever.

The inequity of petitioner's argument becomes more apparent when we consider the proposition that if petitioner is correct in its reasoning, then petitioner could have elected to institute commission or judicial proceedings in Kansas City, Missouri, the domicile of its named insured and the statutory employer of respondent, or in Georgia, where U. S. Van Lines, Inc. of Atlanta, Georgia, for whom respondent was driving the truck under lease, was domiciled, thus requiring respondent to abandon his chosen compensation claim in Louisiana and seek to protect his interest in Missouri or Georgia.

In the instant litigation respondent exercised his constitutional and valid choice of forum by instituting his claim for compensation benefits in Louisiana before anything was done in Texas. The instant case is, accordingly, for this reason alone, clearly factually distinguishable from that dealt with in this Court in *Magnolia Petroleum Company v. Hunt*, in *Carroll v. Lanza*, and by the District of Columbia Court of Appeal in *Gasch v. Britton*. There is, accordingly, no conflict between the disposition and result reached in the instant litigation by the Louisiana Supreme Court and decisions such as *Magnolia Petroleum Company v. Hunt* and *Carroll v. Lanza* relied on by petitioner, and, accordingly, no basis for granting the petition for certiorari, Rule 19 1(a), Revised Rules of the Supreme Court of the United States.

For the balance of respondent's argument in opposition to the petition for a writ of certiorari, especially the effect of *Industrial Commission v. McCartin*, 330 U.S. 622, 67 S.Ct. 886 (1947), respondent respectfully directs this Court's attention to Appendix I, particularly that part related to Argument On Assignment of Error Number 6, Appendix I, pp. 43a through 49a, and the reproduction therein of the appropriate discussion from Larson's Workmen's Compensation Law, Vol. 3, pp. 369-380, reproduced herein as Appendix "A" to Appendix I, pp. 52a through 67a.

It is submitted that the Louisiana Supreme Court in the instant case correctly concluded that the Texas Workmen's Compensation Act does not contain any "unmistakable language" which would foreclose an additional award under the laws of Louisiana:

> "[2, 3] In the instant case, we must determine whether the Texas Act contains any 'unmistakable language' which would foreclose an additional award under the laws of Louisiana. In the first place, the Texas exclusive coverage clause (Vernon's Ann.Civ.St. art. 8306, § 3) does not have this effect. As a matter of fact, we do not find it significantly different from that of the Illinois statute. Texas does have an express statutory provision which precludes recovery in Texas when recovery has been first obtained in another state for an out-of-state injury:

> "* * * no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the state where such injury occurred.' "
> (Vernon's Ann.Civ.St. art. 8306 § 19)

However, we find nothing in this statute or in any other provision of the Texas Workmen's Compensation law that says that, if the employee first obtains a Texas award for compensation, he shall thereafter be precluded from seeking a successive award in another state, nor have any cases been called to our attention which have so held. Therefore, in accordance with Industrial Commission of Wisconsin v. McCartin, we conclude that the Texas award is final and conclusive only to the rights arising in Texas, and Louisiana is free under the full faith and credit clause to grant an award of compensation in accordance with its own laws, after giving credit for the sums paid under the Texas Act."

Griffin v. Universal Underwriters Insurance Company, 283 So.2d at 752.

CONCLUSION

For these reasons, respondent, Newal W. Griffin, prays for a denial of petitioner's writ of certiorari herein.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing brief of respondent in opposition to petition for a writ of certiorari to the Supreme Court of the State of Louisiana has been mailed this day, postage prepaid, in compliance with Rule 33 of the Supreme Court of the United States to Mr. A. G. Seale, Post Office Box 15766, Broadview Station, Baton Rouge, Louisiana 70815.

Baton Rouge, Louisiana, this ____ day of March, 1974.

Paul H. Dué

APPENDIX I

SUPREME COURT OF LOUISIANA

No. 53,038

NEWAL W. GRIFFIN

versus

UNIVERSAL UNDERWRITERS INSURANCE COMPANY

WRIT OF REVIEW TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF ASCENSION

ORIGINAL BRIEF ON BEHALF OF NEWAL W. GRIFFIN, PLAINTIFF-APPELLANT IN SUPPORT OF WRIT OF REVIEW

SUPREME COURT OF LOUISIANA

No. 53,038

NEWAL W. GRIFFIN

versus

UNIVERSAL UNDERWRITERS INSURANCE COMPANY

Writ of Review to the Court of Appeal, First Circuit, Parish of Ascension

ORIGINAL BRIEF ON BEHALF OF NEWAL W. GRIFFIN, PLAINTIFF-APPELLANT IN SUPPORT OF WRIT OF REVIEW

JURISDICTION

This Court has jurisdiction of this case by virtue of Certiorari or Writ of Review to the Court of Appeal, First Circuit, issued by this Court on the 15th day of January, 1973.

SYLLABUS

The doctrine of res judicata is stricti juris and cannot be applied unless the party relying thereon proves each essential element of the doctrine beyond all question and proves all necessary facts to warrant its application.

McNeal vs. State Farm Mutual Automobile Insurance Company, ____ La. ____, 278 So.2d 108 (1973);
Eugene vs. Ventress, 253 La. 840, 220 So.2d 94 (1969);
Pacific Finance Company of Caddo vs. Benson, 149 So.2d 239 (La. Appeal 2d Cir. 1963) writ refused, 244 La. 128, 150 So.2d 588;
Road Equipment Company vs. Prestenback, 143 So.2d 135 (La.App. 1st Cir. 1962);
Terrebonne vs. Abadie, 132 So.2d 106 (La.App. 1st Cir. 1961).

Workmen's compensation statutes, being intended to remove the burden of waste of life and limb from working men to their employers, who will distribute it among consumers of their products, are liberally interpreted by the courts in order to give such statutes the full benevolent effect intended by the lawmakers.

Johnson vs. Cabot Carbon Company, 227 La. 941, 81 So.2d 2 (1955);
Brooks vs. Griggs Casing Crews, Inc., 136 So.2d 693 (La.App. 2d Cir. 1961).

More than one workmen's compensation statute can apply to a single compensable injury, so long as each

state has a relevant interest in the case. Successive awards can be made in different states, deducting the amount of the first award from the second. An award already recovered under the workmen's compensation act of one state will not bar a proceeding under the workmen's compensation act of another state, unless the act where the award was made was designed to preclude the recovery of an award under any other workmen's compensation act.

Industrial Commission vs. McCartin, 330 U.S. 622, 67 S.Ct. 886 (1947).

A plaintiff may assert a cause of action in Louisiana under the Louisiana Workmen's Compensation Act where the injury occurs in Louisiana, even though both the employee and the employer are residents of another state and even if the contract of employment was entered into in another state.

Johnson vs. El Dorado Creosoting Company, 71 So.2d 613 (La.App.2d Cir. 1954). See also *Mattel vs. Pittman Construction Company,* 174 So.2d 141 (La.App. 4th Cir. 1965).

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

Newal W. Griffin filed suit for workmen's compensation benefits for total and permanent disability in the Trial Court on July 27, 1971, naming as defendant, Universal Underwriters Insurance Company. To plain-

tiff's petition defendant-appellee, Universal Underwriters Insurance Company, filed various exceptions, including a peremptory exception urging res judicata, wherein defendant-exceptor alleged in Paragraph 1 that, "plaintiff filed a claim for workmen's compensation with the Texas Industrial Accident Board." (Record Page 27) Exceptor further alleged that said Board had entered a final award denying plaintiff's right to any additional claims, from which "final award" plaintiff had not appealed, thereby rendering said final award a thing adjudged.

At the trial of the exceptions, the trial judge pretermitted argument concerning the other exceptions filed by defendant and restricted argument to the peremptory exception urging res judicata. (Record Page 50) The case was taken under advisement by the trial court, and in accordance with written reasons for judgment, judgment was rendered, read and signed sustaining the peremptory exception urging res judicata and dismissing plaintiff's suit.

Plaintiff filed a motion for a new trial, and after a stipulation was entered in the record concerning additional evidence, the trial judge denied the motion for a new trial. (Record Pages 84-86) Plaintiff-appellant devolutively appealed from the adverse judgment, which judgment was affirmed by the First Circuit Court of Appeal.

Plaintiff applied for a rehearing, which was denied, and subsequently a writ of review was issued by this

Court on plaintiff's application. The errors complained of by plaintiff are the following:

ASSIGNMENT OF ERRORS

1. THE COURT OF APPEAL ERRED IN CONCLUDING THAT DEFENDANT COULD PROPERLY AND CONSTITUTIONALLY INVOKE THE JURISDICTION OF THE TEXAS INDUSTRIAL ACCIDENT BOARD, AND THUS ELECT TO DEPRIVE PLAINTIFF OF NINETY-NINE WEEKS OF TOTAL AND PERMANENT DISABILITY COMPENSATION BENEFITS.

2. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE TEXAS INDUSTRIAL ACCIDENT BOARD PROPERLY EXERCISED JURISDICTION SO AS TO OUST THE LOUISIANA COURT'S JURISDICTION WHICH HAD PREVIOUSLY BEEN INVOKED BY PLAINTIFF.

3. THE COURT OF APPEAL ERRED IN CONCLUDING PLAINTIFF MADE A CONSTRUCTIVE CHOICE OF TEXAS LAW BY ACCEPTING COMPENSATION BENEFITS.

4. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE TEXAS IN-

DUSTRIAL ACCIDENT BOARD'S SO-CALLED "FINAL AWARD" CONSTITUTED *RES JUDICATA*.

5. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE FULL FAITH AND CREDIT DOCTRINE OF *MAGNOLIA PETROLEUM COMPANY VS. HUNT* CAN BE APPLIED EVEN WHERE PLAINTIFF FILED NO WORKMEN'S COMPENSATION CLAIM WHATSOEVER IN TEXAS, FILED HIS FIRST AND ONLY CLAIM FOR WORKMEN'S COMPENSATION IN LOUISIANA, AND WAS TOTALLY UNAWARE OF ANY CORRESPONDENCE OR COMMUNICATION FROM DEFENDANT TO THE TEXAS INDUSTRIAL ACCIDENT BOARD AND THE OPENING OF A FILE BY THE TEXAS INDUSTRIAL ACCIDENT BOARD UNTIL AFTER PLAINTIFF EFFECTED A COMPROMISE SETTLEMENT WITH THE INSURER OF THE ALLEGED THIRD PARTY TORTFEASOR.

6. THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE MAGNOLIA DOCTRINE HAS ANY APPLICABILITY TO THE INSTANT CASE, SINCE THE UNITED STATES SUPREME COURT HAS EXPRESSLY RESTRICTED THAT DOCTRINE AND MADE IT FACTUALLY

INAPPOSITE TO THE INSTANT CASE, SUBSTITUTING THEREFOR THE SUPREME COURT'S "McCARTIN" DOCTRINE.

7. THE COURT OF APPEAL ERRED IN CONCLUDING THAT DEFENDANT HAD A RIGHT TO TREAT ITS WORKMEN'S COMPENSATION PAYMENTS TO PLAINTIFF AS PAYMENTS MADE PURSUANT TO THE LAW OF TEXAS WHERE THE CONTRACT DOCUMENTS, WHICH WERE BINDING ON DEFENDANT INSURER, OBLIGATED THE LATTER TO PAY WORKMEN'S COMPENSATION IN ACCORDANCE WITH THE LAW OF THE STATE WHERE THE VAN LINE WAS DOMICILED, OR IN THIS CASE, THE LAW OF THE STATE OF GEORGIA.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 1

The Court of Appeal erred in concluding that defendant could properly and constitutionally invoke the jurisdiction of the Texas Industrial Accident Board, and thus elect to deprive plaintiff of ninety-nine weeks of total and permanent disability compensation benefits.

It is submitted that there exists no dispute concerning the facts of this case, and this litigation presents solely issues of law.

The evidence shows that plaintiff, Newal W. Griffin, sustained serious personal injuries on June 29, 1970 as a result of a motor vehicle accident which occurred on U. S. Highway 61 (Airline Highway) in Ascension Parish, Louisiana. At the time of the accident plaintiff was driving a moving van in the course and scope of his employment with Keller Industries, Inc., a Texas corporation, insured through Motor Truck Owners Conference, Inc., a Kansas City, Missouri, concern, which was the named insured of defendant, Universal Underwriters Insurance Company, under a policy of workmen's compensation insurance. At the time of the accident the moving van being operated by plaintiff was under lease to U. S. Van Lines, Inc., of Atlanta, Georgia. (Exhibit "E", Record, Page 31).

As a result of the serious and near fatal injuries sustained by plaintiff, it was necessary that he be hospitalized at the Baton Rouge General Hospital in Baton Rouge, Louisiana, where he remained for a period of four and one-half months post-accident. (Record, Page 57) Plaintiff's wife came from Houston, Texas, rented an apartment in Baton Rouge, Louisiana, and stayed with plaintiff to help with his needed nursing and convalescing. Following his release from the hospital, plaintiff continued to remain under the medical care and treatment of Dr. Allen Jackson, a Baton Rouge orthopedist (Record, Page 57).

The evidence undisputedly shows that plaintiff did nothing whatsoever, either personally or through any agent, to make a claim for compensation benefits under the law of Texas. On the contrary, defendant im-

mediately began paying the $18,000.00 of medical expenses to the Louisiana medical creditors who were taking care of plaintiff, and likewise immediately began paying plaintiff his $49.00 per week total and permanent compensation benefits through the Baton Rouge office of Crawford & Company, defendant's independent insurance adjuster. The evidence further shows that plaintiff was at no time advised by anyone, nor did he or his undersigned attorney have any reason to believe, that plaintiff's workmen's compensation claim was being treated in any manner other than as a Louisiana workmen's compensation claim. Inasmuch as plaintiff was receiving the compensation benefits to which he was entitled and was having his Louisiana-incurred medical expenses paid by defendant, plaintiff could not file any suit in Louisiana, because such suit would have been premature, Louisiana Revised Statute 23:1314 (which provides that if compensation benefits and proper medical expenses are being furnished a suit "shall be premature and shall be dismissed").

Although defendant's exception urging res judicata alleged that, "plaintiff filed a claim for workmen's compensation with the Texas Industrial Accident Board" (Record, Page 27), the evidence unequivocally shows that plaintiff never filed any such claim in Texas, never authorized anyone to file any such claim on his behalf, never received any communication or correspondence from anyone advising him that any such claim or notice of accident or injury had been brought to the attention of the Texas Industrial Accident Board until after he had effected a compromise settlement

with the insurer of the alleged tortfeasor in the sum of $10,000.00, and filed his first and only claim for workmen's compensation by the instant suit in Louisiana. (See Stipulation, Record, Pages 85 through 86. See also Record, Page 57)

Before any judicial proceedings whatsoever had been filed, plaintiff effectuated a compromise settlement with State Farm Mutual Automobile Insurance Company and its alleged negligent insureds in the sum of $10,000.00 paid by State Farm on April 22, 1971. (Record, Pages 18, 19) Nothing further happened in this matter and plaintiff continued to receive his $49.00 weekly workmen's compensation benefits paid by defendant, which coincidentally is the maximum compensation benefit rate in Texas as well as in Louisiana, until plaintiff received a letter from defendant, Universal Underwriters Insurance Company, of Kansas City, Missouri, on June 29, 1971, wherein plaintiff was advised that he would receive no more workmen's compensation benefits because of his alleged election of remedies against third party which allegedly precluded his right to receive additional compensation under the Texas workmen's compensation law and in addition demanded that plaintiff reimburse defendant the $10,000.00 which plaintiff received from State Farm.

Plaintiff forwarded this letter to his undersigned attorney, who wrote a demand letter to defendant on July 8, 1971, a copy of which letter is attached to plaintiff's original brief in the First Circuit Court of Appeal marked for identification as Appendix 1.

When defendant failed to resume payment of weekly compensation benefits in accordance with the demand made by counsel for plaintiff in the aforementioned July 8, 1971 letter, plaintiff filed the instant suit on July 27, 1971.

On August 18, 1971 the Texas Industrial Accident Board, allegedly upon its own motion, determined that plaintiff had made a final election under the Texas Workmen's Compensation Law to proceed against a third party, with the result that plaintiff was no longer entitled to any additional benefits "under the Texas Workmen's Compensation Act". This letter which was sent to plaintiff with a copy to his undersigned attorney, was the first and only communication which either plaintiff or his attorney received from the Texas Industrial Accident Board. This letter indicated plaintiff had twenty days within which to appeal this so-called "final award". A copy of this letter is attached to plaintiff's original brief filed with the First Circuit Court of Appeal, marked Appendix II. Inasmuch as plaintiff had never sought workmen's compensation under the Texas Workmen's Compensation Law, and had some three weeks prior to this action being taken by the Texas Industrial Accident Board already filed the instant workmen's compensation suit in Louisiana, plaintiff did not attempt to appeal this so-called "final award" of the Texas Industrial Accident Board, which by its terms only precluded plaintiff's right to any additional compensation under the *Texas* Workmen's Compensation Act.

It is submitted that under the foregoing circumstances the Court of Appeal erred in concluding that

the defendant could properly and constitutionally invoke the jurisdiction of the Texas Industrial Accident Board, and thus deprive plaintiff of ninety-nine weeks of total and permanent disability compensation benefits. Under the applicable Louisiana law, plaintiff is entitled to five hundred weeks of compensation at the rate of $49.00 per week, Louisiana Revised Statute 23:1221, as amended, whereas under Texas law plaintiff is entitled only to four hundred one weeks of compensation at the rate of $49.00 per week, Vernon Texas Statutes Annotated Title 130, Article 8306, Section 10 as amended. Obviously, it is plaintiff's claim for compensation, not defendant's, and defendant cannot unilaterally select a forum which operates to mitigate or diminish the compensation to which plaintiff is otherwise entitled. To hold otherwise results in an unconstitutional deprivation of due process and equal protection under the law.

Moreover, for the reasons more particularly set forth in the argument accompanying Specification of Error 7, defendant was contractually precluded from selecting which law to apply, and had available only the right to select the law of the state where the van line was domiciled, i.e., the law of the State of Georgia, which is analogous in effect to that of Louisiana, and which is diametrically opposed to the forfeiture provision contained in the Texas Workmen's Compensation Act.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 2

The Court of Appeal erred in concluding that the Texas Industrial Accident Board properly exercised jurisdiction so as to oust the Louisiana Court's jurisdiction which had previously been invoked by plaintiff.

The Court of Appeal by its opinion herein has condoned the ouster of the Louisiana court's jurisdiction by virtue of the so-called "final award" entered by the Texas Industrial Accident Board, and has thus given no effect to plaintiff's election of remedies and plaintiff's prior institution of his only asserted claim for compensation in Louisiana some three weeks before the Texas Industrial Board entered any order whatsoever. Once plaintiff made his election of remedies and instituted his workmen's compensation suit in Louisiana, the first claim which he ever presented anywhere, such deprived the Texas Industrial Accident Board of the right to exercise jurisdiction in opposition to plaintiff's instituted compensation claim in Louisiana, particularly since such action taken by the Texas Industrial Accident Board was unilateral action instigated by defendant who was sued in Louisiana, and of which plaintiff had no notice, in which plaintiff did not at all participate, acquiesce or ratify.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

The Court of Appeal erred in concluding plaintiff made a constructive choice of Texas law by accepting compensation benefits.

The Court of Appeal erred in holding that plaintiff made a constructive choice of Texas law by accepting compensation benefits which were automatically and voluntarily paid to him by defendant's agent in Baton Rouge, Crawford & Company. There was nothing whatsoever in connection with these payments which could in any way possibly apprise plaintiff or his undersigned attorney that defendant was treating this workmen's compensation claim other than as a Louisiana workmen's compensation claim. The compensation checks were for the same amount, contained no descriptive information to place anyone on alert, and were paid to plaintiff in Baton Rouge for the first five months after the accident where plaintiff resided (four and one-half months of which were in Baton Rouge General Hospital). Plaintiff never even saw the $18,000-.00 plus payment of medical expenses, which checks were paid by defendant's Baton Rouge agent directly to the Louisiana medical creditors. It is submitted that it is unfounded and unwarranted to consider plaintiff's acceptance of these weeks of compensation payments under these circumstances "as tantamount to a choice or selection of the state in which he wishes to recover and receive payments on his claim", that is, a choice or selection of the law of Texas, as held by the Court of Appeal (Opinion of First Circuit Court of Appeal, p. 9, 268 So.2d at 709).

All of the evidence negates any knowledge or any constructive notice on the part of either plaintiff or his attorney of any treatment of this matter under the Texas law as opposed to treatment as a Louisiana compensation claim. Indeed, it is interesting to note that

the file copy of the certified letter sent by defendant's Baton Rouge adjuster, W. L. Cawthon of Crawford & Company in Baton Rouge, Louisiana, to the negligent motorist and her husband, dated December 21, 1970, placing these individuals on notice of a subrogation claim by defendant and asking that they turn the letter over to their liability insurer, makes no reference to any Texas compensation proceedings or file per se, which letter, like the compensation checks, emanated from the Baton Rouge agent or adjuster for defendant.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 4

The Court of Appeal erred in concluding that the Texas Industrial Accident Board's so-called "final award" constituted res judicata.

The Court of Appeal further erred in concluding that the Texas Industrial Accident Board's so-called "final award" constituted *res judicata*. At the outset, it will be noted that the so-called "final award" simply purported to preclude plaintiff from the right to claim compensation benefits *under the Texas Workmen's Compensation Act*. It in no way purported to deprive plaintiff of his right to claim compensation under the law of any other state, and thus gave plaintiff no reason for concern inasmuch as he had never made any claim for workmen's compensation under Texas law, had never participated in any proceedings in Texas, and indeed had no prior notice or knowledge of anything going on in Texas until he and his undersigned attorney received a copy of this so-called "final award", which was by its own terms entered some three weeks *after*

plaintiff had already instituted his suit for workmen's compensation benefits in Louisiana.

It is interesting to note that the Court of Appeal quoted Louisiana Civil Code Article 2286 and enumerated the various requisites for *res judicata*. It will be readily observed that Louisiana Civil Code Article 2286 requires that there be *a demand*. The Article says that "the thing demanded must be the same" in the two suits; the article also says that, "the demand must be founded on the same cause of action". The Article further says that the demand must be between the same parties and formed by them against each other in the same quality. *Res judicata* in Louisiana is stricti juris, and the common law more pervasive doctrines such as collateral estoppel do not apply. It is obvious that there was no *demand* whatsoever; plaintiff never demanded anything in Texas. On the contrary, the only thing which occurred in Texas was the unilateral attempt by defendant to have the Texas Industrial Accident Board enter a so-called "final award" declaring plaintiff not entitled to any compensation under the Texas Workmen's Compensation Act. Inasmuch as there was no demand whatsoever, *res judicata* by its terms cannot apply. Nor can the use of the word "demand" be equated with the phrase "cause of action". The requisite, "demand" imparts something more than a cause of action; namely, an instituted claim or an instituted action. That the term "demand" can not be equated with the phrase "cause of action" is particularly salient by reading the following clause of Article 2286: "The demand must be founded on the same cause of action." Obviously, "demand" means

something more than "cause of action". There having been no demand by plaintiff in Texas, that is, no claim filed in Texas, no proceedings brought in Texas, no acquiescence in any Texas proceedings, and indeed no action whatsoever taken in any respect by plaintiff in Texas, it is simply unfounded to conclude that *res judicata* as defined by Louisiana Civil Code Article 2286 can have any possible applicability to this situation.

It is also submitted that the so-called "final award" by the Texas Industrial Accident Board does not at all purport to constitute an adjudication on the merits of plaintiff's claim for workmen's compensation benefits, but on the contrary is strikingly similar to a statutory scheme which prevails in Texas, and which is entitled to no greater full faith and credit than this Court permitted and clothed the Mississippi statutory scheme in *McNeal vs. State Farm Mutual Automobile Insurance Company*, ____ La. ____, 278 So.2d 108 (1973). As this Court will recall in *McNeal*, this Court refused to apply res judicata to the Mississippi litigation or to give the Mississippi adjudication full faith and credit under the full faith and credit clause of the United States Constitution, for the following reasons:

> "The doctrine of res judicata is stricti juris, and any doubt as to its application must be resolved in favor of maintaining the action. Quinette vs Delhommer, 247 La. 1121, 176 So.2d 399 (1965); West v. His Creditors, 3 La. Ann. 529 (1848).

"Under the full Faith and Credit Clause of the United States Constitution, a judgment that is not on the merits is no bar to later proceedings on the same cause of action. U.S. Const. Art. IV § 1; Angel v. Bullington, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1946); Laroussini v. Werlein, 50 La.Ann. 637, 23 So. 467 (1898); Lerner v. Bischoff, La.App., 193 So. 236 (1940); 47 Am.Jur.2d, Judgments, § 1235, p. 237; Leflar, The Law of Conflict of Laws § 78, p. 138 (1959); 15 Tul.L.Rev. 312-314 (1941).

"Although the Mississippi judgment dismissed the suit against State Farm Mutual, the insurer, it did so on the technical ground that the absence of a direct action statute and the family immunity doctrine barred the suit in Mississippi. The judgment did not reach the merits of the case. Hence, as to the present suit in Louisiana, it is not res judicata."

McNeal vs. State Farm Mutual Automobile Insurance Company, 278 So.2d at 110 — emphasis supplied by author of this brief.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 5

The Court of Appeal erred in concluding that the full faith and credit doctrine of Magnolia Petroleum Company vs. Hunt can be applied even where plaintiff filed no workmen's compensation claim whatsoever in Texas, filed his first and only claim for workmen's compensa-

tion in Louisiana, and was totally unaware of any correspondence or communication from defendant to the Texas Industrial Accident Board until after plaintiff effected a compromise settlement with the insurer of the alleged third party tortfeasor.

The Court of Appeal erred in concluding that the full faith and credit doctrine of *Magnolia Petroleum Company vs. Hunt* can be applied even though plaintiff has made no claim and no choice of law, filed no compensation claim whatsoever in Texas, filed his first and only compensation claim in Louisiana, and was totally unaware of any correspondence or communication from defendant to the Texas Industrial Accident Board and the opening of a file by the Texas Industrial Accident Board until after plaintiff effected the compromise settlement with the insurer of the alleged third party tortfeasor. The Court of Appeal quoted extensively from *Magnolia Petroleum Company vs. Hunt*, 320 U.S. 430, 64 So. Ct. 208 (1943), but then chose to disregard the clear language of that decision basing its result on the fact that the employee Hunt, having chosen to seek and pursue his compensation remedy in Texas, was thereafter precluded from seeking a compensation remedy in Louisiana upon the same grounds. This is made clearly evident by the following sentence quoted from *Magnolia Petroleum Company vs. Hunt* and reproduced on Page 7 of the court of appeal's opinion:

"... Respondent was free to pursue his remedy in either state but, having chosen to seek it

> in Texas, where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds."

The Court of Appeal, it is submitted, chose to disregard the clear rationale of *Magnolia Petroleum Company vs. Hunt,* and chose instead to opine that the decision of the Texas Industrial Accident Board in *Magnolia Petroleum Company vs. Hunt* became res judicata, "not because plaintiff employee had a choice of forums, but because he had failed to appear at a hearing on the Board's final award, when duly notified of it". (Opinion of First Circuit Court of Appeal, Page 9) It is submitted that a fair reading of *Magnolia Petroleum Company vs. Hunt* clearly shows that this suggested basis was not that on which the United States Supreme Court decided the case, but, on the contrary, the basis for the Supreme Court's decision was that the employee Hunt, having chosen to pursue his compensation remedy first in Texas, and thus having invoked on his own the Texas jurisdiction, he could not thereafter revoke his election of remedies and subsequently pursue a compensation remedy in Louisiana.

Moreover, at least the employee Hunt was given prior notice of the scheduled date for the hearing to be conducted by the Texas Industrial Accident Board. In the instant case, plaintiff had no prior notice of any hearing whatsoever, and was instead met with a *fait accompli* when he received his first communication from the Texas Industrial Accident Board, to wit, a

purported decision or "final award" which had been accomplished without any notice either to plaintiff, or to his undersigned counsel, or to anyone else.

Such procedure has recently been expressly repudiated by the United States Supreme Court as violative of constitutional due process. In this connection this Court's attention is invited to the following pertinent excerpt from the United States Supreme Court's Opinion in *Fuentes vs. Shevin*, 92 So. Ct. 1983 (1972):

> "[1,2] For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' Baldwin v. Hale, 68 U.S. 223, 1 Wall. 223, 17 L.Ed. 531. See Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914; Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62.
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> * * *
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> "[3,4] The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions.

The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v. Household Finance Corp., 405 U.S. ____, ____, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424.

"The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights .... [And n]o better instrument has been devised for arriving at truth

than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 871 Frankfurther, J., concurring).

"[5] If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not ... embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. ____, ____, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551."

Fuentes vs. Shevin, 92 S.Ct. at 1994, 1995.

It is submitted that plaintiff cannot constitutionally be required to abandon his previously-instituted Louisiana compensation claim and appeal from the Texas Industrial Accident Board's so-called "final award" in order to preserve his right to compensation benefits, particularly where plaintiff in no way whatsoever participated in or had knowledge of any proceedings in

Texas. Indeed, there were no proceedings in Texas, no prior scheduled hearing, but on the contrary, simply the *ex proprio motu* determination by the Texas Industrial Accident Board, without prior notice to anybody, including plaintiff, that plaintiff was no longer entitled to compensation benefits under the Texas Workmen's Compensation Act. Plaintiff had no opportunity to be heard before the purported forfeiture of this right to compensation took place. This unconstitutional deprivation of due process and equal protection under the law deprives the so-called Texas decree of the dignity needed to have it constitute *res judicata* and be entitled to full faith and credit.

Moreover, it is earnestly submitted that Texas obviously would not do the same thing that Louisiana has done to plaintiff herein, as evidenced by the case of *Standard Accident Insurance Company vs. Skidmore,* 222 S.W.2d 344 (1949). In the *Skidmore* case, the defendant insurance company tried to make the Texas Court give full faith and credit to an Arkansas Workmen's Compensation Commission award to the plaintiff of twelve weeks of compensation for temporary total disability, which was all of the compensation which the Arkansas Commission determined plaintiff employee was entitled to, even though plaintiff had accepted the compensation payments. When the matter was litigated in Texas, however, plaintiff claimed that he had not filed any claim in Arkansas and had not made any election of remedies. Moreover, there was no showing that the plaintiff knew of the filing of the claim on his behalf by his employer or the action by the Arkansas Commission until after all of the pay-

ments had been made to him, *after which,* he filed claim in Texas. The Texas appellate court concluded that the evidence failed to establish a binding election of remedies on the part of the plaintiff-employee, so as to warrant the sustaining of a plea in abatement and motion to dismiss filed by the defendant insurer. Stated simply, the Texas Court refused to give full faith and credit to the Arkansas Commission award and refused to hold that award as *res judicata* because of the absence of proof of an election of remedies by the plaintiff-employee. A copy of this case is attached to the application for rehearing and incorporated herein, marked Exhibit "I".

It is obvious that the Texas citizen in the *Skidmore* case was not deprived of his right to compensation by virtue of the Arkansas Commission award, whereas the Texas citizen in the instant case is being deprived of his right to compensation in Louisiana. Both cases are analogous in that the evidence clearly shows that in both cases neither employee knew of the proceedings which occurred in another state, nor had the employee made any binding election so as to dignify the proceedings in the other state to the point where they were entitled to full faith and credit. Since there was no election of remedies there was no applicability of the full faith and credit clause. By the Court of Appeal's holding herein, the Court has unconstitutionally deprived this plaintiff of equal protection under the law. It is submitted that just as the employee *Skidmore* was permitted to ignore the Arkansas Commission proceedings because he had not elected to pursue any remedy in Arkansas, even though he collected compensa-

tion pursuant to the Arkansas decree, plaintiff herein was not required to appeal the so-called "final award" by the Texas Industrial Accident Board in order to preserve his previously made election of remedies by instituting suit in Louisiana before anything happened in Texas, and where plaintiff had instituted no proceedings in Texas or done anything whatsoever to possibly warrant the conclusion that he elected to proceed under Texas law.

The trial judge in his written reasons for judgment expressed sympathy for plaintiff's position in this litigation, but nevertheless felt constrained to apply the decision of *Magnolia Petroleum Company vs. Hunt*, 320 U.S. 430, 64 Sup.Ct. 208 (1943) and thus sustain the peremptory exception urging res judicata:

> "This court is in accord with the views expressed in the dissenting opinion of Justice Black in Magnolia. Were it my prerogative to do so I would overrule Magnolia or at least restrict its application to those instances where an employee knowing of two remedies which purport to be mutually exclusive, knowledgably [sic] chooses one as against the other and is thereafter precluded from a second choice. But recognizing the supremacy of the Supreme Court of the United States as the 'final arbiter' in these conflict of laws problems I have no choice but to apply the rule of Magnolia, sustain the defendant's plea of res judicata, and dismiss the plaintiff's suit at his

costs." (Written Reasons for Judgment, Record, p. 40)

It is submitted that a cursory reading of the United States Supreme Court's opinion in *Magnolia Petroleum Company vs. Hunt*, cited supra, readily shows that this is exactly the reason that the plaintiff-employee, Hunt, was barred from a double recovery in Louisiana; to wit: He had *knowingly* chosen to pursue his compensation remedy in Texas, and it was not until *after* a final award of compensation had been made in Texas that the plaintiff-employee first attempted to seek recovery in Louisiana.

It is respectfully submitted that the trial court erred in considering as the controlling findings of fact in *Magnolia Petroleum Company vs. Hunt*, cited supra, the interpretation of those facts set forth in the dissenting opinion. This is made evident by a review of the trial court's reasons for judgment as follows:

> "... But neither was Hunt, the employee in Magnolia, aware of the fact that the two forms presented to him for his signature were documents prepared by the Industrial Accident Board. In neither case did the employee participate in the proceedings before the Board and in both instances the employee filed suit in Louisiana before the Texas award became final."
> (Written Reasons for Judgment, Record, pp. 36, 37)

It is significant to note that this version of the facts is not that which was found by the Louisiana First Circuit Court of Appeal, as evidenced by its reported decision in *Hunt vs. Magnolia Petroleum Company,* 10 So.2d 109 (La.App. 1st Cir. 1942). In particular, this Court's attention is directed to the following excerpts from the Louisiana appellate court's opinion and relevant findings of fact:

> "On June 8, 1939, plaintiff also submitted two forms to the Industrial Accident Board, both of which had been supplied by the Board, one being styled 'Claim for Compensation' and the other 'Notice of Injury'. These forms were filled out by plaintiff's wife but were signed by him. All matters relating to the filing of these forms by both the employer and the employee appeared to have been in conformity with the usual procedure under the Workmen's Compensation Law of Texas." (10 So.2d at 110)

> "Several months later he was sent to San Antonio, Texas to be examined by Dr. Amos Graves, and on October 16, 1940, *he wrote a letter which he addressed to the 'State Board of Compensation, Austin, Texas'* in which he stated that Dr. Graves had advised him to undergo further operations on his leg and he would like to know what effect his refusal to submit to such operations would have on his compensation payments. *He also made some inquiries regarding a reasonable settlement*

for his injury." (10 So.2d at 110 — emphasis added.)

The Louisiana appellate court unequivocally concluded that the plaintiff-employee *voluntarily participated* in the proceedings before the Texas Industrial Accident Board and thereby became a party to the same, as evidenced by the following:

"... nor can we agree that plaintiff did not at least voluntarily participate in the proceedings before that Board and thereby became a party to the same." (10 So.2d at 112, 113)

These same crucial findings of fact and the whole tenor of the majority of the United States Supreme Court opinion is to the same effect, as evidenced by the following excerpts from the Supreme Court opinion in *Magnolia Petroleum Company vs. Hunt,* cited supra, to wit:

"*He sought and procured in Texas an award of compensation for his injury under its Workmen's Compensation Law,* and petitioner's insurer made payments of compensation as required by the statute and the award." (64 Sup. Ct. at 210 — emphasis added.)

"*Respondent filed with the Texas Industrial Accident Board a claim for compensation for his injury under the Texas Workmen's Compensation Law,* as is the usual method of instituting a proceeding before the Board. Without

awaiting an award on respondent's claim, petitioner's insurer paid respondent compensation for his injury at the statutory maximum for seventy-three weeks. A dispute as to the proper prognosis of respondent's injury, *a request for advice made by respondent to the Board,* and a suspension by the insurer of further compensation payments to respondent, on the ground that his total disability had terminated, *all prompted the Board to set the case for a hearing on his pending claim.*" (Footnote 2, 64 Sup.Ct. at 210, 211 — emphasis added.)

"But it does not follow that the employee who has sought and recovered an award of compensation in either state may *then* have a recourse to the laws and courts of the other to recover a second or additional award for the same injury." (64 Sup.Ct. at 212, 213 — emphasis added.)

Respondent was free to pursue his remedy in either state *but, having chosen to seek it in Texas,* where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds." (64 Sup.Ct. at 216 — emphasis added.)

Another Texas case which emphasized and demonstrated the determining criterion to be the election of remedies by the plaintiff-employee is *Texas Employers' Insurance Association vs. Hale,* 242 S.W.2d 796

(1951), the pertinent part of which is attached to plaintiff's original brief filed in the First Circuit Court of Appeal and marked Appendix VI. This Court's attention is directed to Headnote No. 1 and the accompanying test therefor appearing at Page 797, both of which indicate that inasmuch as the evidence failed to show that the plaintiff-employee elected to receive compensation under the laws of New Mexico, he was not precluded from proceeding under the laws of Texas.

This same point was made by the United States Supreme Court in *Carroll vs. Lanza*, 349 U.S. 408, 75 Sup. Ct. 804, 806, wherein it distinguished the earlier Supreme Court opinion of *Magnolia Petroleum Company vs. Hunt*, as follows:

> "Nor do we have a case where an employee, knowing of two remedies which purport to be mutually exclusive, chooses one as against the other and therefore is precluded a second choice by the law of the forum."

It is well established that the doctrine of res judicata is stricti juris, and in cases of doubt must be rejected, *McNeal vs. State Farm Mutual Automobile Insurance Company*, ____ La. ____, 278 So.2d 108 (1973); *Eugene vs. Ventress*, 253 La. 840, 220 So.2d 94 (La. Sup. Ct. 1969). Inasmuch as res judicata is raised by a peremptory exception, the burden of proof is upon the exceptor which must establish each essential element of the doctrine beyond all question before the exception urging res judicata can properly be sustained, *Road Equipment Company vs. Prestenback*, 143 So.2d

135 (La. App. 1st Cir. 1962); *Terrebonne vs. Abadie*, 132 So.2d 106 (La. App. 1st Cir. 1962). Stated otherwise, an exception urging res judicata, because res judicata is strictly construed, should not be sustained "unless pleadings *and facts* clearly justify its application", *Pacific Finance Company of Caddo vs. Benson*, 149 So.2d 239 (La. App. 2d Cir. 1963), writ refused, 244 La. 128, 150 So.2d 588.

It is submitted that the defendant-exceptor failed to carry the heavy burden of proof necessary to warrant application of the plea of res judicata. All of the pertinent jurisprudence, including most importantly the case relied on so heavily by the defendant-exceptor, *Magnolia Petroleum Company vs. Hunt*, cited supra, emphasizes that only where the plaintiff-employee has elected to pursue a compensation remedy in one state will the court of another state be justified in holding the plaintiff bound by such election. There is absolutely no evidence in the case presently before the Court to indicate in any way, shape or form such an election of remedies by the plaintiff. There is no evidence whatsoever to indicate the plaintiff even knew that anything was being done in Texas or under Texas law until after his compensation payments were terminated by the defendant, whereupon plaintiff instituted this suit in Louisiana *before* any Texas decree was entered.

Plaintiff did not choose to pursue a compensation remedy in Texas nor did plaintiff participate in any compensation proceedings in Texas such as plaintiff Hunt did in *Magnolia Petroleum Company vs. Hunt*.

Because of this absence of choice, this absence of any election by the plaintiff of remedies, and indeed the complete absence of knowledge by either plaintiff or his undersigned counsel of any Texas proceedings, it is submitted that the exception urging res judicata should have been overruled.

Since plaintiff had no knowledge of any Texas proceedings, how possibly could the plaintiff protect himself from the result which the trial court reached? The election of remedies and the choice of compensation laws under which plaintiff's claim is to be disposed of rests with the plaintiff, and plaintiff chose Louisiana. It is strenously urged that there is nothing in the law, the facts or in equity which warrants or requires Louisiana courts to deny plaintiff his choice.

It is clear that where the injury occurs in Louisiana, this alone is sufficient to make applicable the Louisiana Workmen's Compensation Act, even though both the employee and the employer be residents of another state, and even if the contract of employment was entered into in another state, *Johnson vs. El Dorado Creosoting Company,* 71 So.2d 613 (La.App.2d Cir. 1954 - See Headnote 10 and accompanying opinion at pp. 618 and 619). See also *Mattel vs. Pittman Construction Company,* 174 So.2d 341 (La.App.4th Cir. 1965).

Even the Texas Workmen's Compensation Statute does not seek to preclude a Texas employee from electing to pursue a workmen's compensation remedy in another state wherein the employee sustained the injury, as evidence by Article 8306, Section 19(c), a copy

of which Texas statutory provision was attached to plaintiff's original brief filed with the First Circuit Court of Appeal.

Plaintiff validly elected to pursue his claim for workmen's compensation in Louisiana, rather than in Texas by the filing of the instant suit, which was certainly to plaintiff's benefit, inasmuch as the compensation period for total and permanent disability is 500 weeks in Louisiana, whereas it is only 401 weeks in Texas (Compare Louisiana Revised Statute 23:1221 as amended with Vernon Texas Statutes Annotated Title 130, Article 8306, Section 10 as amended).

Significantly, defendant-appellee itself chose to avail itself of the Louisiana Workmen's Compensation Act by virtue of its having filed in the same trial court a suit wherein Universal Underwriters Insurance Company has sought to recover the amount of compensation benefits and medical expenses paid to or on behalf of Newal W. Griffin, in accordance with the subrogation rights accorded by Louisiana Revised Statute 23:1101 of the Louisiana Workmen's Compensation Act. (See *"Universal Underwriters Insurance Company vs. Leslie S. Richard, Connie C. Richard and State Farm Mutual Automobile Insurance Company*), No. 17,511 — 23rd Judicial District Court Ascension Parish, filed June 24, 1971, which suit record has been introduced in evidence herein, Record, P. 86). Indeed, in this suit, by amended petition, defendant-appellee has made plaintiff, Newal W. Griffin, an additional defendant, against whom it seeks reimbursement of the $10,000.00 previously received by Newal W. Griffin from State

Farm, while at the same time maintaining that it owes Mr. Griffin no further workmen's compensation.

If the judgments of the trial court and the Court of Appeal are permitted to stand, then plaintiff will be deprived of 449 weeks of compensation benefits for his admitted total and permanent disability, even though plaintiff elected to pursue his workmen's compensation claim solely in Louisiana, and was totally unaware of any unilateral effort by defendant to classify his right to compensation as a "Texas compensation claim".

Both *Magnolia Petroleum Company vs. Hunt* and the jurisprudence construing it have applied the "Hunt" rule only where the plaintiff-employee, not the defendant-employer or the workmen's compensation insurer, has made a binding election of remedies. Plaintiff herein neither elected to pursue any compensation remedy in Texas, nor did he acquiesce in any Texas compensation proceedings, and on the contrary, elected to pursue a compensation remedy only in Louisiana.

Defendant has in essence asserted that even though plaintiff elected to pursue his compensation remedy in Louisiana and filed suit thereon after amicable demand to no avail *before* either plaintiff or his attorney received any notice whatsoever from the Texas Industrial Accident Board concerning the so-called final award, and in fact *before* this order was ever rendered, for some reason plaintiff was required to place his Louisiana suit for compensation benefits in abeyance,

or possibly even abandon it, and hire another attorney to appear before the Texas Industrial Accident Board or a court of review in Texas or else suffer the consequences of res judicata. This simply cannot be the law. All of the cases clearly show that plaintiff employee has the right to elect the forum, which plaintiff did in this case. Plaintiff filed his suit for compensation benefits in Louisiana *before* the Texas Industrial Accident Board took any action whatsoever.

The inequity of defendant's argument becomes more apparent when we consider the proposition that if defendant is correct in its reasoning, then defendant could have elected to institute commission or judicial proceedings in Kansas City, Missouri, the domicile of its named insured and the statutory employer of plaintiff, or in Georgia, where U. S. Van Lines, Inc. of Atlanta, Georgia, for whom plaintiff was driving the truck under lease, was domiciled, thus requiring plaintiff to abandon his chosen compensation claim in Louisiana and seek to protect his interest in Missouri or Georgia.

In this particular case plaintiff exercised his constitutional and valid choice of forum by instituting his claim for compensation benefits in Louisiana before anything was done in Texas. The essential error committed by the trial court and by the Court of Appeal in the instant case was the conclusion that plaintiff could be held to have forfeited his rights to workmen's compensation benefits by effecting a compromise settlement with State Farm Mutual Automobile Insurance Company for substantially less than what the unpaid

total and permanent compensation benefits would be, which was done at a time when plaintiff was completely unaware that the defendant insurance company herein was unilaterally treating this claim as a Texas compensation claim, without any notice to plaintiff or his attorney.

It is the clearly established law of Louisiana that workmen's compensation statutes, being intended to remove the burden of waste of life and limb from working men to their employers, who will distribute it among consumers of their products, should be liberally interpreted by courts in order to give such statutes the full benevolent effect intended by the lawmakers. As stated by the Louisiana Supreme Court in *Johnson vs. Cabot Carbon Company*, 227 La. 941, 81 So.2d 2, 4 (1955):

> "In the case of Dyer v. Rapides Lumber Company [In re Dyer], 154 La. 1091, 98 So. 677, 679, we held as follows:
>
> '* * * workmen's compensation statutes are intended to take the burden of the waste of life and limb *off the shoulders of working men and place it upon those of their employers, who in turn would distribute it amongst the consumers of the product. And in order to give such statutes the full benevolent effect intended by the lawmaker, it is essential that courts should give them a liberal interpretation.* And such has been the attitute of this court from the beginning toward our own statute, as we have

> just had occasion to say in Lemieux v. Cousins, [154 La. 81] 98 So. 255, this day decided.'" [Emphasis supplied by the Louisiana Supreme Court]

Exactly the reverse effect is obtained in the instant case if the judgments of the trial court and the Court of Appeal are allowed to stand, as the result of such a judgment would be the unconscionable forfeiture of plaintiff's rights to total and permanent compensation disability benefits for 449 weeks, which unpaid sum, even when discounted, obviously greatly exceeds the $10,000.00 paid to plaintiff by State Farm Mutual Automobile Insurance Company. This injustice and inequity should not be permitted to occur, especially since if defendant-appellee is entitled to a credit for the $10,000.00 which plaintiff received, such credit could be given against the outstanding, unpaid 449 weeks of compensation benefits.

A recent example of the applicability of the principles of nonforfeiture of rights by an employee and the liberal construction of the Workmen's Compensation Act in favor of the employee is found in *Brooks vs. Griggs Casing Crews, Inc.*, 136 So.2d 693 (La. App. 2d Cir. 1961). In this case the plaintiff and a compensation insurance company entered into a court-approved compensation settlement agreement where plaintiff was employed in Louisiana but sustained accidental injury in Texas. Plaintiff was under the misconception that the Louisiana rule precluding a tort action against a statutory employer or principal contractor likewise applied in Texas. After the compensation settlement

had been court approved, plaintiff learned of his mistake, and sought to have the court-approved compensation settlement rescinded, so that he could proceed in Texas for compensation benefits, and also have a tort action against the principal contractor or statutory employer. Predictably, the principal contractor opposed this effort and appealed an adverse judgment. The appellate court dismissed the appeal, concluding that even if the mistake with regard to Texas law were purely a mistake of law, nevertheless it sufficed to support an annulment of the court-approved settlement.

Defendant has argued that plaintiff is presumed to know the law and the results which would follow from his having made a settlement with the insurance company for the tortfeasor. Counsel for plaintiff disagrees with this argument for the reason that if any mistake were made, it was solely ignorance of the fact that defendant-appellee was treating this compensation claim as a Texas compensation claim, rather than as a Louisiana Compensation claim even though the compensation rates were the same and were paid by checks issued by defendant's Louisiana adjuster, Crawford & Company, in Baton Rouge, Louisiana. Even if there were a so-called mistake of law as opposed to mistake of fact, which is denied, *Brooks vs. Griggs Casing Crews, Inc.* cited supra, indicates that the plaintiff employee can avoid the injurious consequences of such a mistake of law, because of the public policy favoring liberality of construction of the Workmen's Compensation Law in favor of the worker and the public policy opposing forfeitures of compensation benefits.

The essential reason for the judgments of the trial court and Court of Appeal sustaining the peremptory exception urging res judicata was the conclusion that the U. S. Supreme Court decision of *Magnolia Petroleum Company vs. Hunt* so required. In reaching this conclusion, it is submitted that the trial court and the Court of Appeal failed to recognize that the *Hunt* case was, by the very terms of the United States Supreme Court majority opinion, applicable only because the employee Hunt had *first chosen* to pursue his workmen's compensation remedy in Texas and obtained an award of a lump sum for 75 weeks of total disability plus 125 weeks of partial disability. It was Hunt's election of remedies which precluded his then pursuing a compensation remedy in Louisiana.

The instant case is obviously distinguishable from the *Hunt* case, as the evidence conclusively shows plaintiff made no such election of remedies, has never chosen to pursue any compensation remedy in Texas and was at all pertinent times completely unaware of anything which was going on in Texas.

The Louisiana courts were obviously not willing to foreclose Hunt's Louisiana compensation remedy as evidenced by the First Circuit's opinion and the refusal of a writ of error by the Louisiana Supreme Court in that case. It is submitted that the Louisiana courts should not now extend the United States Supreme Court's *Hunt* rule beyond its controlling facts so as to preclude plaintiff's right to compensation in the instant case. Texas would not do so as evidenced by *Standard Accident Insurance Company v. Skid-*

more and *Texas Employers' Insurance Association vs. Hale*, cited supra. This should be especially true where the Louisiana courts are asked to enforce a Texas deprivation of compensation rule which contradicts with Louisiana statutory law, since it is clear that in Louisiana an injured workman does not lose his right to compensation by settling with an alleged third party tortfeasor, Louisiana Revised Statute 23:1101. Defendant is protected in such circumstances since defendant, as a workmen's compensation insurer, has a separate and independent cause of action against the alleged third party tortfeasors and no action which plaintiff might take binds the defendant insurer so as to preclude its independent cause of action against such third parties, Louisiana Revised Statute 23:1103 (last paragraph):

> "No compromise with such third person by either the employer or the injured employee or his dependent shall be binding upon or affect the rights of the others unless assented to by him."

In summation, it is submitted that the election of jurisdictions rests with the plaintiff worker, and not with the defendant compensation insurer. Moreover, the defendant should not be permitted to obtain a complete windfall by penalizing plaintiff for having settled with the tort liability insurer for the policy limits, in complete ignorance of any intention on the part of defendant-appellee to treat this claim as a Texas compensation claim with the obvious effects thereof, especially when absolutely no injury will befall defendant-

appellee by permitting him to recover his workmen's compensation benefits for total and permanent disability, and giving a credit for the sum plaintiff has received against the outstanding 449 weeks of compensation benefits due plaintiff by defendant, if such credit is in fact due. Clearly nothing in the law requires the result reached by the courts below which result thwarts the policy of liberality of construction of compensation laws in favor of the plaintiff and permits a forfeiture of compensation benefits which plaintiff is otherwise clearly entitled to recover.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 6

> *The Court of Appeal erred in concluding that the Magnolia doctrine has any applicability to the instant case, since the United States Supreme Court has expressly restricted that doctrine and made it factually inapposite to the instant case, substituting therefor the Supreme Court's "McCartin" doctrine.*

As previously indicated the trial judge expressed his personal accord with the views of the dissenting opinion of Justice Black in *Magnolia Petroleum Company vs. Hunt,* indicating were it his prerogative to do so, he would limit *Magnolia Petroleum Company vs. Hunt* to its particular facts:

> "This court is in accord with the views expressed in the dissenting opinion of Justice Black in Magnolia. Were it my prerogative to do so I would overrule Magnolia or at least re-

> strict its application to those instances where an employee knowing of two remedies which purport to be mutually exclusive, knowledgably [sic] chooses one as against the other and is thereafter precluded from a second choice. But recognizing the supremacy of the Supreme Court of the United States as the 'final arbiter' in these conflict of laws problems I have no choice but to apply the rule of Magnolia, sustain the defendant's plea of res judicata, and dismiss the plaintiff's suit at his costs." (Written Reasons for Judgment, Record, p. 40)

Undersigned counsel readily admits his dereliction in failing to present either to the trial court or to the Court of Appeal the fact that the United States Court did indeed practically overrule *Magnolia Petroleum Company vs. Hunt* four years later in *Industrial Commission vs. McCartin*, 330 U.S. 622, 67 S.Ct. 886 (1947). The effect of the *McCartin* decision on the *Magnolia* decision has been well analyzed in *Larson's Workmen's Compensation Law*, Vol. 3, pp. 369 through 380, and because of the clarity of this exposition, and in order to avoid unnecessary paraphrasing therefrom, undersigned counsel for plaintiff reproduces and incorporates herein the applicable twelve pages from this treatise, marked for identification as Appendix "A", pp. 52a through 67a.

Larson indicates in early discussion of this question the following: "It is now generally accepted that the *McCartin* case, in practical effect, has recognized the

principle of successive awards and thereby discredited the *Magnolia* case, which had held on its facts that a prior Texas award was a constitutional bar to an award in Louisiana of the amount by which the Louisiana benefits exceeded those allowed by Texas." (Larson, Appendix "A", page 52a) *Larson* points out further in the discussion that the effect of the United States Supreme Court's pronouncements in *McCartin* is that full faith and credit can properly be given to the compensation award of the first state *only if* the workmen's compensation statute of that first state makes it abundantly clear that it is *completely exclusive* and that it is designed to preclude *any recovery* by proceedings brought in *any other* state for injuries received there in the course of employment. In this connection this Court is respectfully requested to review the discussion of the *McCartin* case and the applicable quoted excerpt from that opinion reproduced on Pages 372 and 373 of Volume 3 of *Larson*. (Appendix "A", pp. 57a and 58a).

Larson goes on to recognize that under the Supreme Court's later *McCartin* test even the Texas workmen's compensation statute does not by "unmistakable language" intend to be completely exclusive, and thus bar recovery of compensation benefits in another state by subsequent proceedings in that other state. Indeed, all the applicable Texas statute stands for is the fact that if the converse situation occurs; namely, if the first compensation proceedings are instituted in a state other than Texas, and compensation benefits are awarded, then if a subsequent proceeding is instituted in Texas the Texas law will not permit the claimant

to obtain more in Texas than he was entitled to obtain by virtue of the first compensation proceedings. This distinction concerning the Texas law and its effect is made clear by *Larson* on Pages 373 and 375. (Appendix "A", Pages 58a through 61a)

This distinction is exceedingly pertinent in the instant case, inasmuch as the so-called 'final award' emanating from the Texas Industrial Accident Board clearly intended and expressed the intention that it purported to preclude plaintiff's recovery of additional compensation benefits *only* under the Texas Workmen's Compensation Law. The so-called final award in no way indicated it was intended to be completely exclusive; on the contrary, it indicates solely its restriction insofar as the Texas Workmen's Compensation Law is concerned.

Larson concludes that the practical effect of the United States Supreme Court's *McCartin* decision completely eliminates the practical effect and applicability of the *Magnolia* decision. *Larson* discusses on Pages 375 through 378 of the Treatise various cases which have followed *McCartin* instead of *Magnolia*, since the workmen's compensation law of the state where the first proceeding was conducted did not explicitly preclude proceedings in a subsequent state; see, for example, discussion of *Cook vs. Minneapolis Bridge Construction Company*, 231 Minn. 433, 43 N.W.2d 792 (1950). (Appendix "A", Pages 61a through 64a)

Larson also points out that neither the prior voluntary payment of workmen's compensation benefits,

nor the ex parte payment of compensation benefits as a result of a compensation proceeding instituted ex parte by the employer in which the employee did not participate or apply for — namely, the Texas case of *Standard Accident Insurance Company vs. Skidmore*, 222 S. W. 2d 344 (Texas Civil Appeal 1949) —, nor the denial of compensation in the first state, in any case preclude recovery of compensation in a subsequent case. All three of these principles and situations are applicable in the instant case. The compensation benefits were paid to Mr. Griffin on a voluntary basis by defendant. Secondly, whatever compensation proceedings occurred herein in Texas, they were the result of unilateral ex parte action by defendant in which plaintiff-employee did not apply for compensation or participate in the proceedings. Finally, the effect of the so-called "final award" by the Texas Industrial Accident Board was a denial of compensation in the first state, namely, Texas, (solely, however, under the Texas Workmen's Compensation Law). As stated by *Larson*, this denial does not preclude recovery in the second state, or in this case, in Louisiana. (Appendix "A", Pages 64a through 67a)

It is earnestly submitted that reliance on *Magnolia Petroleum Company vs. Hunt* by trial court and by the First Circuit Court of Appeal is erroneous, not only for the other reasons set forth in this brief, but also for the reason that the *Magnolia* case itself has been effectively repudiated, emasculated and rendered nugatory from a practical standpoint by the United States Supreme Court itself in the *McCartin* case decided by that Court only four years after *Magnolia*. The effect

of the *McCartin* case and its progeny is that no full faith and credit can properly be given to the first compensation award unless the law of the first state is by "unmistakable language" *completely* exclusive in *its intended scope and operation.* The Texas Workmen's Compensation Act, as analyzed by *Larson,* fails to possess any such exclusivity. Moreover, as indicated by *Larson* on Pages 378 through 380 (Appendix "A", Pages 64a through 67a), in any three situations the facts are even stronger than in the McCartin case and in which, a fortiori, the first proceedings have been held not to prejudice the second: (1) The prior voluntary payment of compensation; (2) The ex parte request by the employer for determination of compensation owed to the employee where the employee has not participated in such initial proceedings (the Texas case of *Standard Accident Insurance Company vs. Skidmore,* cited supra); and (3) the denial of compensation, as distinguished from the award of a certain amount of compensation benefits, by the first state, which denial does not under full faith and credit necessitate or warrant a denial of compensation benefits in a second state. All three of these favorable fact situations exist in the instant case.

It is indeed unfortunate that the *McCartin* case and the attached *Larson* treatise exposition were not brought to the attention of either the trial court or the Court of Appeal herein, since surely had either of those lower courts been apprised of this subsequent development in the United States Supreme Court's jurisprudence, the result would have been a denial of the defendant's peremptory exception urging res judicata.

The opportunity, of course, still exists for this Court to not perpetuate the judicial deprivation of workmen's compensation benefits which plaintiff should recover from defendant.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 7

> *The Court of Appeal erred in concluding that defendant had a right to treat its workmen's compensation payments to plaintiff as payments made pursuant to the law of Texas where the contract documents, which were binding on defendant insurer, obligated the latter to pay workmen's compensation in accordance with the law of the state where the van line was domiciled, or in this case, the law of the state of Georgia.*

It is further submitted that the Court of Appeal erred in concluding that the specific language contained in the contract documents that the compensation remedy would be pursuant to the law of the state where the van line was domiciled, which in this case would be Georgia, the domicile of U. S. Van Lines, Inc. of Atlanta, Georgia, can be disregarded because the Certificate of Insurance contains the words "applicable in each state". This language in the Certificate of Insurance must be read in connection with the contract documents which particularize which state law is applicable and specify that it be the law of the state where the van line is domiciled. The contract documents offered in evidence were prepared by the defendant, and must be construed against defendant as the author

thereof. Defendant cannot properly urge that the language "applicable in each state" contained in the Certificate of Insurance abrogates the specific language contained in the other contract documents. The language of the contract documents is specific and unequivocal:

> "By becoming a member of the Motor Truck Owners' Conference and authorizing the van line to whom you are under contract to withhold from your revenue an amount equal to Workmen's Compensation premium, *you and your employees are covered* under the Workmen's Compensation policy issued to Motor Truck Owners' Conference, Inc. in the Universal Underwriters Insurance Company *according to the terms of the Workmen's Compensation Act of the state in which the van line is domiciled.*"
> (Exhibit "D", Record, Page 30 — emphasis added)

At the time of the accident "the van line to whom [Keller Industries, Inc. was] under contract" was U. S. Van Lines, Inc. of Atlanta, Georgia, with plaintiff being the specified authorized driver of the moving van involved in the accident. (Exhibit "E", Record Page 31. See also testimony of Marvin (erroneously shown in the transcript as "Martin") Keller, President of Keller Industries, Inc. (Record Pages 54, 55).

The Georgia Workmen's Compensation Act is similar to the Louisiana Workmen's Compensation Act, in

that under Georgia law, like under Louisiana law, plaintiff is entitled to pursue both his compensation remedy and his tort remedy against third parties. This is evidenced by Section 114-403 of the Georgia Workmen's Compensation Act, as amended, which statutory provision is attached to the application for rehearing as Exhibit "II". Louisiana law is to the same effect, see Louisiana Revised Statute 23:1101 through 1103. Accordingly, both the Georgia workmen's compensation law and the Louisiana compensation law differ entirely from the Texas workmen's compensation law, as both Georgia and Louisiana permit the injured-employee to pursue both a tort remedy and a compensation remedy.

Accordingly, defendant's attempted selection of Texas workmen's compensation law as the law applicable to this claim was invalid and in violation of the contract documents, and its unilateral attempt to rely on the so-called Texas "final award" so as to bar plaintiff's right to compensation is likewise unjustified.

If defendant wanted to establish that the Certificate of Insurance abrogated the restricted choice of law as set forth in the foregoing contract document, it was incumbent upon defendant to offer a certified copy of the insurance policy in order to establish its right to have its peremptory exception of *res judicata* sustained. Defendant bears the burden of proving it can properly be sustained. The failure of defendant to offer a certified copy of the policy or to explain the alleged discrepancy between the restricted choice of law contained in the foregoing quoted contract document and

the supposed contradiction therewith as reflected in the Certificate of Insurance, constitutes still another reason for denying defendant's attempt to have this suit dismissed.

CONCLUSION

For the foregoing reasons, Newal W. Griffin, plaintiff-appellant urges this Honorable Court to reverse the judgment of the Court of Appeal, First Circuit, and to reverse the judgment of the Twenty-third Judicial District Court in and for the Parish of Ascension, sustaining the peremptory exception urging res judicata filed on behalf of defendant, and dismissing this suit, to overrule the peremptory exception urging res judicata, and to remand this suit to the Twenty-third Judicial District Court in and for the Parish of Ascension for further proceedings.

APPENDIX "A"

EXCERPT
FROM
LARSON, WORMKEN'S COMPENSATION,
VOLUME 3, pages 369-380*

§ 85 SUCCESSIVE AWARDS IN DIFFERENT STATES

§ 85.00 More than one statute can apply to a single compensable injury, so long as each state has a rele-

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*(Sentences which are emphasized in the reproduced excerpt from the treatise are by the author of this brief.)

vant interest in the case. Successive awards can be made in different states, deducting the amount of the first award from the second.

§ 85.10 *The "Magnolia" doctrine*

An appraisal of the present rule on successive awards in different states must take the form of an analysis of two Supreme Court decisions, the *McCartin*[29] case and the *Magnolia*[30] case. *It is now generally accepted that the McCartin case, in practical effect, has recognized the principle of successive awards and thereby discredited the Magnolia case,* which had held on its facts that a prior Texas award was a constitutional bar to an award in Louisiana of the amount by which the Louisiana benefits exceeded those allowed by Texas.

Since, however, the *McCartin* case did not expressly overrule the *Magnolia* case, it is necessary to scrutinize the two opinions with some care, to see whether the *McCartin* case has indeed established a successive-award principle of general applicability.

The story up to the time of the *McCartin* case can be quickly told. The state courts, with virtual unanimity, had held or assumed that a prior award under the laws of another state was no bar to an award under local law made in accordance with the local law's own

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[29]Industrial Comm'n v. McCartin, 330 U.S. 622, 67 S. Ct. 886, 91 L. Ed. 1140, 169 A.L.R. 1179 (1947).

[30]Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943).

standards of applicability,[31] always of course, with the understanding that the claimant could not have a complete double recovery but must deduct from his present recovery the amount of the prior award.

Then, in 1943, an oil field laborer, whose supplementary award in Louisiana, after a Texas award, had been sustained by the Louisiana appellate courts, appeared *pro se* to defend his award against constitutional attack in the Supreme Court of the United States. His failure gave us the *Magnolia* case, a five-to-four decision, with two dissents. The rationale of the holding was that "in Texas, a compensation award ... is explicitly made by statute in lieu of any other recovery" for the same injury; the award therefore became res adjudicata and was entitled to full faith and credit in other jurisdictions like any judgment. The case evoked widespread controversy, with many writ-

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[31] *Massachusetts:* McLaughlin's Case, 274 Mass. 217, 174 N.E. 338 (1931).

Migues' Case, 281 Mass. 373, 183 N.E. 847 (1933).

New Jersey: Sweet v. Austin Co., 12 N.J. Misc. 381, 171 A. 684 (1934).

New Mexico: Hughey v. Ware, 34 N.M. 29, 276 P. 27 (1929).

New York: Bach v. Hampden Sales Ass'n, 293 N.Y. 847, 59 N.E. 2d 439 (1944).

Gilbert v. Des Lauriers Column Mould Co., 180 App. Div. 59, 167 N.Y. Supp. 274 (1917).

South Carolina: Price v. Horton Motor Lines, Inc., 201 S.C. 484, 23 S.E.2d 744 (1942).

Wisconsin: Interstate Power Co. v. Industrial Comm'n, 203 Wis. 466, 234 N.W. 889 (1931).

Salvation Army v. Industrial Comm'n, 219 Wis. 343, 263 N.W. 349, 101 A.L.R. 1440 (1935).

Accord, *Restatement of the Conflict of Laws* § 403, as worded prior to 1947 amendment. See § 85.20, N. 36 *infra*.

ers deploring the new turn of events and favoring the dissenting views.[32]

§ 85.20 *The "McCartin" doctrine*

Four years later, the *McCartin* case, in which the Supreme Court of Wisconsin, on the strength of the *Magnolia* doctrine, had denied a supplementary recovery in Wisconsin[33] after an Illinois award, reached the Supreme Court of the United States. Here an Illinois resident had made a contract of employment with an Illinois employer in Illinois, pursuant to which he did some work in Wisconsin, in the course of which he was injured. He began compensation proceedings in both states. While the Wisconsin proceedings were pending, the Illinois commission issued a formal order approving a settlement agreement under Illinois law, and full payment was made under the order. The settlement contract, however, contained this sentence: "This settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin."

The Supreme Court of the United States, this time by unanimous vote, reinstated the Wisconsin award,

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[32]Freund, "Chief Justice Stone and the Conflict of Laws," 69 Harv. L. Rev. 1210 (1946); Wolkin, "Workmen's Compensation Award — Commonplace or Anomaly in Full Faith and Credit Pattern," 92 U. of Pa. L. Rev. 401 (1944); 44 Col. L. Rev. 330 (1944); 48 Dick. L. Rev. 194 (1944); 12 Geo. Wash. L. Rev. 487 (1944); 19 Ind. L.J. 268 (1944); 17 So. Cal. L. Rev. 315 (1944); 18 Tul. L. Rev. 509 (1944).

[33]McCartin v. Industrial Comm'n, 248 Wis. 570, 22 N.W.2d 522 (1946).

distinguishing the *Magnolia* case. *The primary ground of distinction was not, however, the express reservation of Wisconsin rights, but the absence in the Illinois statute or case law of an explicit prohibition against seeking additional or alternative relief under the laws of another state. Since the vast majority of compensation laws resemble the Illinois law in this respect, the decision has been taken to mean that for all practical purposes successive awards are now sanctioned.*[34] The amendment of the Restatement, designed to bring it into harmony with these decisions,[35] adopted this interpretation by using the following language:

> "Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, unless the Act where the award was made was designed to preclude the recovery of an award under any other Act, but the amount paid on a prior award will be credited on the second award."[36]

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[34] Writers for law reviews have almost unanimously interpreted the case as in effect overruling *Magnolia* for purposes of most state statutes: 60 Harv. L. Rev. 993 (1947); 33 Corn. L.Q. 310 (1947); 23 Ind. L.J. 214 (1947); 19 N.Y.S.B.A. Bull. 199 (1947). Cf. 47 Colum. L. Rev. 846 (1947).

[35] Goodrich, *Conflict of Laws* 289 (3d ed. 1949).

[36] *Restatement of Conflict of Law* § 403. The "Proposed Official Draft of the Restatement of the Law Second, Conflict of Laws," dated May 1, 1968, streamlines the statement of the rule to the following concise version:

"§ 182. Effect of Two Statutes Governing Injury

"Relief may be awarded under the workmen's compensation statute of a State of the United States, although the statute of a sister state is also applicable."

The crucial paragraph of the *McCartin* opinion, setting forth the reason for its conclusion (before anything is said about the express reservation in the contract) is sufficiently important to warrant quotation in full. The Court first quotes the Illinois exclusive-coverage clause and shows that it means in Illinois (as it does in practically every other state) that it is exclusive only in the sense that no other common law or statutory remedy *under local law* can be sought. The Court then goes on to say:

> "But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, that it is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. [Citing cases] And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted [citing cases], we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play. [Citing cases]

> "We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen's Compensation Act forbidding an employee from seeking alternative or additional relief under the laws of another state . . . ."[37]

At this point the Court discusses the express reservation of rights in Wisconsin, and concludes with these significant words:

> "the reservation *spells out* what we believe to be *implicit in that Act* — namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state."[38]

Thus, the Court comes back to its basic and original ground, the nature of the statute itself, and says that the express reservation does no more than make abundantly clear what the act of itself must in any case be construed to mean.

§ 85.30 *What states are affected by McCartin rule*

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[37] 67 S. Ct. at 889.

[38] 67 S. Ct. at 890. Italics supplied.

A more careful reading of the opinion at this point would have prevented the blunder in Bolton v. O'Connor, 114 F.Supp. 273 (S.D. Miss. 1953). Injury was in Mississippi, contract and residence in Louisiana. Award was made in Mississippi, and later another sought in U.S. District Court of Mississippi under Louisiana law. *Held:* Magnolia Rule applicable; *McCartin* case distinguished on the sole ground that it was based on the stipulation between the parties.

The decisive question therefore becomes: Does the statute of a given state, as construed by "unmistakable language," forbid relief under the laws of another state? One thing is clear: The normal exclusive-coverage cause does not have this effect, as the *McCartin* opinion itself recognizes.[39] It is therefore important to observe, in estimating the impact of *McCartin* on *Magnolia*, that the general exclusive coverage clause of Texas was not significantly different from that of Illinois. Texas did, however, have an express statutory provision, existing in very few other states,[40] that if

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[39]Curiously, this elementary point was missed by the District of Columbia Court of Appeals in Gasch v. Britton, 202 F.2d 356 (D.C. Cir. 1953); Fahy, J., dissenting. The Court denied an award in the district after an award had been made in Maryland, on reasoning similar to that in the *Magnolia* case. The decision was based on the exclusive coverage provision relating to suit against the employer, that compensation shall be in lieu of "any and all rights of action whatsoever against any person whomsoever." The Court made much of broad exclusiveness language from Victory Sparkler & Specialty Co. v. Francks, 128 A. 635 (Md. App. 1925), which however, was nothing more than a garden-variety holding that the compensation remedy is exclusive of common-law actions, and contained no language, unmistakable or other, on compensation awards in sister states. Here the employee lived in Maryland and was injured there, but the place of employment contract was in the District of Columbia.

[40]See also, Nevada Indus. Comm'n v. Underwood, 79 Nev. 496, 387 P.2d 663 (1963). Nevada law (Nev. Rev. Stat. § 616.530(1) (1963)), provides that "any action or proceeding in any other state to recover damages or compensation . . . shall constitute an irrevocable waiver of any and all compensation" under the Nevada laws. The employee was hired in Idaho, was regularly employed in Nevada, but was killed in an accident in Utah. The widow filed a claim on which benefits were voluntarily paid under the Idaho compensation laws. The claim and payment were held to effect the irrevocable waiver, although she and the carrier had expressly agreed that she reserved

an employee *first* obtains compensation in another state for an out-of-state injury, he shall not *thereafter* get an award in Texas. Note that this is not the present situation, but its reverse. *The statute does not go on to say what the Magnolia opinion reads into it, that if the employee first obtains compensation in Texas he shall not thereafter get compensation outside of the state.* The *McCartin* opinion seems to hold that this latter kind of prohibition must now appear in the statute or case law of a particular state if the *Magnolia* doctrine is to apply. *On this interpretation of the McCartin rule, the Magnolia doctrine will apparently not apply even in Texas, once its statute and decisions are realistically construed. For it cannot honestly be said that anything in the Texas statutes or cases indicates that, when the sequence of events takes the form of a first award in Texas and a supplementary award in another state to bring the amount up to the standards of the latter, the State of Texas has any*

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her rights to claim death benefits under the Nevada law. Court dicta indicated that the quoted Nevada provision, referring to "action" and "damages," applied to common-law actions, while "proceeding" and "compensation" applied to compensation claim proceedings, but an unsuccessful action or proceeding would not bar a subsequent claim under the Nevada law. Treatise cited.

Arizona and Oregon provide that their own laws shall not apply to out-of-state injuries if the law of the state of injury applies. But this is quite a different matter, since it delimits local coverage generally and leaves nothing to the claimant's election. Similar in this respect is the Massachusetts provision that if an employee has elected, under a foreign act permitting such election, to remain under common-law rules generally, he shall not be covered by compensation in Massachusetts. This too is not an election, for the purpose of a particular injury, between coexisting rights, but a definition in advance of the basic scope of the local statute. . .

unconquerable aversion to the second award. All Texas says is that if some other state has first awarded compensation, it will add nothing to it in a later proceeding brought in Texas.

§ 85.40 *Application of McCartin rule by states*

The above analysis of the *McCartin* decision's effect has been confirmed, not only by the Restatement and almost all writers,[41] but also by the great majority of subsequent cases.[42] *Cook v. Minneapolis Bridge*

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[41] § 85.20, Ns. 34, 35, and 36 *supra*.

[42] *Arizona:* Agee v. Industrial Comm'n, 10 Ariz. App. 1, 455 P.2d 288 (1969). Claimants, residents of Colorado who were hired in Colorado, were injured while on a trucking run in Arizona on their way to California. They received lump sum settlements in Colorado, and then sought recovery in Arizona. *Held:* nothing in the settlements barred further recovery in Arizona, and claimants were entitled to the additional benefits provided by Arizona law.

Florida: de Cancino v. Eastern Airlines, 239 So. 2d 15 (Fla. 1970). Prior filing of a compensation claim in New York held not to bar the filing of a claim and an award of benefits in Florida, where Florida did have jurisdiction over the accident, the only limitation being that credit would have to be given for any benefits received in New York.

Massachusetts: Lavoie's Case, 334 Mass. 403, 135 N.E.2d 750, *cert. denied*, 352 U.S. 927, 77 S. Ct. 224, 1 L. Ed. 2d 162 (1956). Rhode Island resident who made employment contract there and had received benefits under its act for an injury in Massachusetts held entitled to recovery under Massachusetts act.

Michigan: Schenkel v. Tower Builders Co., 380 Mich. 492, 157 N.W.2d 204 (1968). Claimant, an Indiana resident, was employed by an Indiana corporation. While performing some work in Michigan he suffered disabling injuries. Compensation was applied for and recovered in Indiana, whose compensation act had been construed to be exclusive. Claimant then applied for and received additional benefits in Michigan, with credit being given for weekly payments made under the Indiana

act. The court held that the acceptance of benefits under the Indiana act did not deprive Michigan of jurisdiction to award additional benefits under its act, and the full faith and credit clause of the United States Constitution did not bar the receipt of benefits under the act of one state after an award has been made in another state whose statute had been construed so as to be exclusive in application.

Minnesota: Cook v. Minneapolis Bridge Constr. Co., 231 Minn. 433, 43 N.W.2d 792 (1950).

Accord: Sorenson v. Standard Constr. Co., 238 Minn. 68, 55 N.W.2d 630 (1952).

Mississippi: Martin v. L & A Contracting Co., 249 Miss. 441, 162 So.2d 870 (1964). Claimant was hired and regularly employed in Mississippi but was injured in Florida. *Held:* he could receive benefits under both the Florida and Mississippi Compensation Acts, deducting the amount of the first award from the second. Treatise cited.

Harrison Co. v. Norton, 244 Miss. 752, 146 So. 2d 327 (1962). The claimant was employed under a contract made in Georgia to work in Mississippi, his residence and the place of injury. The carrier voluntarily made payments under the Georgia act and the claimant signed a Georgia form for "Final Compensation Settlement Receipt." He later brought a claim for permanent partial disability under the Mississippi act. The court reasoned that since the Mississippi act states that "No agreement by an employee to waive his right to compensation under this act shall be valid" (Miss. Code Ann. § 6998-21 (1942) Rec., § 15), the "Final Receipt" of Georgia benefits did not bar a claim for Mississippi benefits. The court limited its decision to permitting a subsequent award, with credit for previous benefits paid, where the first award was granted under those state acts, such as Georgia, which do not specifically make an award in such state exclusive. Treatise quoted.

New Jersey: Cramer v. State Concrete Corp., 39 N.J. 507, 189 A.2d 213 (1963). An award under the New York act does not bar the claimant's right to claim benefits under the New Jersey act. Treatise cited.

Bowers v. American Bridge Co., 43 N.J. Super. 48, 127 A.2d 580, *aff'd* 24 N.J. 390, 132 A.2d 28 (1956). New Jersey awarded benefits even though claimant had received payment in Pennsylvania, the place of injury, because the Pennsylvania act does not expressly exclude the right of recovery by an injured workman under the laws of any other state. Treatise cited.

Hudson v. Kingston Contracting Co., 58 N.J. Super. 455, 156

Construction Company is typical.[43] Here the employer's business, the employee's residence, and the place of contracting were in Minnesota, while the place of injury was in North Dakota. Benefits were first received under a North Dakota award. The exclusive-remedy clause of the North Dakota statute was admittedly even stronger than that of Illinois, for it provided that injured employees 'shall have recourse . . . only to the fund and not to the employer" and in another section that "the payment of compensation ... shall be in lieu of any and all rights of action whatsoever." *But since the statute did not explicitly preclude proceedings in another state, the Minnesota Supreme Court held that the McCartin rule permitted a supplementary award in Minnesota.*

The Wisconsin Supreme Court, confronted with a similar set of facts, laid its stress on the question

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A.2d 491 (1959). The deceased employee was a resident of Pennsylvania, the employer was domiciled in New Jersey, the place of contract was New Jersey, and the fatal accident occurred in Maryland. The widow was awarded $10,300 under the Maryland compensation act but would receive $36,855.02 under the New Jersey act. The court followed the *McCartin* case, holding that the Maryland act was exclusive only as to rights arising in Maryland. The difference in the awards was found to be so great as to be obnoxious to the policy of the New Jersey act, justifying the denial of full faith and credit. New Jersey benefits were awarded less the amount paid under the Maryland award. The court specifically followed the dissenting opinion in Gasch v. Britton, § 85. 30, N. 39 *supra*.

Contra:

Federal: Gasch v. Britton, § 85.30, N. 39 *supra*.

Bolton v. O'Connor, § 85.20. N. 38 *supra*.

[43]231 Minn. 433, 43 N.W.2d 792 (1950).

of finality of the first award.[44] A prior award has been made in Montana for temporary total disability, and payments were still running at the time of the Wisconsin award. The Wisconsin Court observed that the Montana Board had continuing jurisdiction over the award, and could later determine any permanent disability that might exist. The first award was therefore not "final," and, under the *Magnolia* and *McCartin* opinions, not binding on other states. Whether the *Magnolia* decision meant final in this sense or final in the sense that the exact points covered by the particular award, being unappealed,[45] could not be reopened, may be debatable; but this case in any event is one more illustration of the tendency toward construction of the *Magnolia* rule.

§ 85.50 *Prior voluntary payment or denial*

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[44]Spietz v. Industrial Comm'n, 251 Wis. 168, 28 N.W.2d 354 (1947). See also, Plater v. Kane Warehouse Co., 241 Md. 733, 217 A.2d 102 (1966). Claimant regularly worked in Washington and Virginia, but was injured in Maryland. An award was made under the Maryland act, but claimant also filed under the Washington act, which provided greater benefits. Claimant was permitted to withdraw the Maryland claim and proceed under the Washington act.

[45]Chapman v. John St. John Drilling Co., 73 N.M. 261, 387 P.2d 462 (1963). The employee was awarded compensation in Texas, but appealed the award. He then filed a claim under the New Mexico act. The New Mexico Supreme Court avoided an application of the *Magnolia* doctrine by noting that, under Texas law, a case pending appeal is not res judicata, and therefore full faith and credit need not be given in New Mexico. Dismissal of the claim under the New Mexico act reversed and remanded for hearing and determination. Treatise cited.

Several variants of the successive-award problem may be mentioned in each of which the facts are much stronger than in the *McCartin* case and, in which, *a fortiori*, the first proceedings have been held not to prejudice the second. *Several cases, both before and after McCartin, have held that a prior voluntary payment of compensation accepted by the employee under the laws of one state does not detract from the employee's statutory right to an award in another state, whether the agreement for compensation had received commission approval or not.*[46] *Similarly, when the em-*

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[46] *California:* Industrial Indem. Exch. v. Industrial Acc. Comm'n, 80 Cal. App. 2d 480, 182 P.2d 309 (1947).

Kentucky: Industrial Track Builders of Am. v. LeMaster, 429 S.W.2d 409 (Ky. App. 1968). Claimant received benefits under Indiana law, and then filed a claim in Kentucky. Shortly after injury claimant signed an agreement with the carrier to receive benefits under the Indiana act, but took no further action, other than to receive benefits. The court held that since there was no express intention in the Indiana statute to have its law be exclusive, claimant was allowed to file a subsequent claim in Kentucky. However, the court indicated that in other circumstances, such as if claimant had knowingly filed a claim in Indiana and prosecuted it to a final award, he might not be entitled to later claim benefits in Kentucky. Treatise quoted.

Michigan: Cline v. Byrne Doors, Inc., 324 Mich. 540, 37 N.W.2d 630, 8 A.L.R.2d 617 (1949).

Adams v. Emery Transp. Co., 15 Mich. App. 593, 167 N.W.2d 110 (1969). Claimant worked for two trucking companies, which eventually merged. He was injured prior to the merger, and filed two compensation claims, one against one of the firms in Illinois, and the other in Michigan, against both firms. The Illinois claim was settled, including an agreement that Illinois had exclusive jurisdiction, and that claimant would dismiss the Michigan proceedings. However, he did not do so, and eventually was awarded compensation against the employer which had not been involved in the Illinois claim. On Appeal, the court held that although it was not satisfied with the result, the Illinois settlement would not bar further proceedings in Michigan, and the Michigan employer could not

ployee has not applied for compensation, but an award has been entered at the ex parte request of the employer, even Texas, with its express statute forbidding an award to one who has "elected to pursue his remedy" in another state, permits a supplementary award.[47]

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take credit for any amount paid pursuant to the Illinois decree, which involved a different employer.

New Jersey: Miller v. National Chair Co., 19 N.J. Misc. 275, 18 A.2d 847, *aff'd*, 127 N.J.L. 414, 22 A.2d 804 (1941), *aff'd per curiam*, 129 N.J.L. 98, 28 A.2d 125 (1942).

Della Vecchia v. World Scope Publishing Co., 64 N.J. Super. 333, 165 A.2d 872 (1960). The claimant was awarded New York compensation without appearance before the board or service of process. He cashed the checks. The court held that his actions did not bar a claim under the more generous provisions of the New Jersey compensation act.

New Mexico: Franklin v. George P. Livermore Inc., 58 N.M. 349, 270 P.2d 983 (1954). Employment contract in New Mexico, injury in Texas; voluntary payments under Texas law did not amount to a waiver of any rights under New Mexico law.

See also, Reed v. Fish Eng'r Corp., 74 N.M. 45, 390 P.2d 283 (1964). Payment of Utah benefits may toll the statute of limitations of filing a later claim for New Mexico benefits. Case remanded.

And cf. Pate v. Makin Drilling Co., 66 N.M. 402, 349 P.2d 121 (1960). The employee of a New Mexico firm was sent from New Mexico to an oil field in Texas, where he was injured. Compensation was paid under the Texas compensation act until the benefits expired. The employee then filed claim for benefits under the New Mexico act. A lower court order requiring the employer to pay medical benefits was reversed. The court stated that the order would have been tantamount to a finding that the employer was also liable under the New Mexico act before such liability had been determined.

[47]Standard Acc. Ins. Co. v. Skidmore, 222 S.W.2d 344 (Tex. Civ. App. 1949).

Texas Employers' Ins. Ass'n v. Miller, 370 S.W.2d 12 (Tex. Civ. App. 1963). The Texas insurance carrier had the employee sign an "election of benefits" statement upon receipt of voluntarily paid Louisiana benefits. The court held that since he

Moreover, a denial of compensation in the first state does not necessitate a denial in the second state.[48] Thus, when the employment contract was in Missouri and the injury in Arkansas, a denial of compensation in Arkansas, on the ground that claimant was an independent contractor, was held not to require a denial in Missouri, since each state may have its own interpretation of employee status.[49]

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did not read the statement, and, having only a fourth grade education, did not understand what he was signing, the equitable rule abhorring elections would support a finding that no election had been made. Texas benefits award, supplemental to the Louisiana benefits, affirmed.

[48] *Maine:* Smith v. Heine Safety Boiler Co., 119 Me. 552, 112 A. 516 (1921).

Missouri: Loudenslager v. Gorum, 355 Mo. 181, 195 S.W.2d 498, *cert. denied,* 331 U.S. 816, 67 S. Ct. 1301, 91 L. Ed. 1834 (1946).

New Mexico: La Rue v. El Paso Natural Gas Co., 57 N.M. 93, 254 P.2d 1059 (1953). Denial of award by Arizona, on the ground that the injury did not arise in the course of the employment, was not a bar at a subsequent suit in New Mexico. Claimant was injured in Arizona, and resided there, but was employed in New Mexico and had been working there. This is significant since New Mexico will not allow a double recovery there for the same accident because it is contrary to public policy. Hughey v. Ware, 34 N.M. 29, 276 P.2d 27 (1929). Court stated that since claimant here had not received an award in Arizona this decision did not conflict with the *Hughey* case.

New York: Yoshi Ogino v. Black, 278 App. Div. 146, 104 N.Y.S.2d 82 (1951).

Oklahoma: Le Flore County Gas & Elec. Co. v. Sickmann, 348 P.2d 312 (Okla. 1959). Since the contract of hire was consummated in Oklahoma, a denial in Arkansas did not preclude an award in Oklahoma.

[49] Loudenslager v. Gorum, N. 48 immediately *supra* under *Missouri.*